TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 13

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT ON THE STATE OF MASSACHUSETTS.

FILED SEPTEMBER 19, 1905.

(19,908.)

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SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPERIOR COURT ON THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 14, 1906.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Taunton, within and for the County of Bristol, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between the Commonwealth of Massachusetts, by complaint, Plaintiff and the Interstate Consolidated Street Railway Company, Defendant, in a plea of not guilty, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Interstate Consolidated Street Railway Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-first day of August in the year of our Lord one thousand nine hundred and five.

L. C. TUCKER,
Deputy Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by
JOHN A. AIKEN,
Chief Justice of the Superior Court of Massachusetts.

2 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

And now, here, the Judges of the Superior Court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, Simeon Borden, Clerk of said Superior Court have hereunto set my hand and the seal of said Court this ninth day of September A. D. 1905.

[Seal the Superior Court.]

SIMEON BORDEN, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify, that Simeon Borden, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court for the County of Bristol, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County; that he is, by law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, of the files records and proceedings of the said Superior Court are in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this seventh day of September in the year of our Lord one thousand nine hundred and five.

[Seal the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

4 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

At the Superior Court holden within and for the County of Bristol for the transaction of criminal business:—

Commonwealth of Massachusetts *vs.* The Interstate Consolidated Street Railway Company, a corporation established under the laws of the Commonwealth of Massachusetts, and carrying on business in Attleboro in the County of Bristol, Appellant from a Judgment of the First District Court of Bristol, holden at Attleboro in said County, by the Special Justice of said Court, on the sixteenth day of December A. D. 1903, upon a complaint of Charles E. Bliss of Attleboro in said County, who therein complains and upon oath says:

That The Interstate Consolidated Street Railway Company a corporation established by the laws of said Commonwealth and carrying on business at Attleboro aforesaid, in the County aforesaid, on

the eleventh day of December in the year of our Lord nineteen hundred three did refuse to sell tickets for the transportation of pupils of the public schools at the special rates provided by section 72 of chapter 112 of the Revised Laws of Massachusetts, contrary to the provisions of said section.

CHARLES E. BLISS.

BRISTOL, *ss:*

Received and sworn to this twelfth day of December in the year of our Lord, one thousand nine hundred and three.

Before me,

FRED B. BYRAM,
Special Justice.

5 This appeal was entered in this Court on the first Monday of January A. D. 1904.

At the February Sitting A. D. 1904 holden at Taunton, within and for said County of Bristol, upon the plea of not guilty made to said complaint in the Court below, the cause after a full hearing is submitted to a jury duly empanelled and sworn to try the same, to wit: Charles H. Grinnell, Foreman, and his fellows, Fred A. Briggs, George Carlisle, Francis Chabot, Thomas J. Clynes, Lester S. Cornell, Duncan S. Elliott, George E. Nye, Hugh Porter, Bernard A. Skinner, David R. Smith and William M. Sturdy, who on the twelfth day of February A. D. 1904 return their verdict therein and say that thereof the said Interstate Consolidated Street Railway Company is guilty.

On said twelfth day of February A. D. 1904 the District Attorney comes and moves for sentence.

It is therefore ordered by the Court on this twelfth day of February A. D. 1904 that the said Interstate Consolidated Street Railway Company be sentenced to pay a fine of Twenty-five Dollars ($25.00).

On said twelfth day of February A. D. 1904 the following motion to stay execution of sentence is filed:

Now comes the defendant, after conviction and sentence and moves the Court for a stay of execution of the sentence imposed upon it, pending the determination by the Supreme Judicial Court of the questions raised in the defendant's exceptions alleged in this case, upon the ground that there is reasonable doubt whether the judgment should stand.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY,
By EVERETT W. BURDETT, *Its Attorney.*

Feb. 12, 1904.

6 I, Lloyd E. White, the Justice imposing sentence in this case do hereby certify that in my opinion there is reasonable doubt whether the judgment should stand. It is therefore ordered that execution of said sentence be stayed until the further order of the Court.

LLOYD E. WHITE, *J. S. C.*

And now certain questions of law having arisen at the trial the same are carried to the Supreme Judicial Court upon the defendant's exceptions.

The case was thence continued and on the second day of March A. D. 1905 the Clerk is directed by rescript from the Supreme Judicial Court to make the following entry upon the docket of the Superior Court:—"exceptions overruled."

On the sixteenth day of June A. D. 1905 upon motion of the District Attorney it is ordered by the Court that the stay of the execution of the sentence heretofore ordered in this case be removed, and that the sentence that the said Interstate Consolidated Street Railway Company pay a fine of Twenty-five Dollars ($25.00) be affirmed.

Attest:—

SIMEON BORDEN, *Clerk.*

7 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

Superior Court.

COMMONWEALTH
vs.
INTERSTATE CONSOLIDATED STREET RAILWAY CO.

Exceptions.

And now comes the defendant in the above-entitled cause and after conviction presents its bill of exceptions as follows, namely:

This was a complaint under the Revised Laws, chapter 112, section 72, alleging that the defendant, on the eleventh day of December A. D. 1903, refused to sell tickets for the transportation of pupils of the public schools in the town of Attleboro at the reduced rates required by the statute. Plea not guilty.

The defendant admitted the fact charged, but claimed that the statute was unconstitutional and void, in that it denied to the defedant the equal protection of the laws, and deprived the defendant of its property without just compensation and without due process of law; and the defendant made certain offers of proof and requested certain rulings of law, copies of which are hereto attached and made a part hereof, in substantiation of its claim. But the Court rejected the offers of proof and denied the requests for rulings, and directed a verdict of guilty.

Whereupon the defendant duly excepted to the rejection of its offers of proof, and to the refusal of its requests for rulings, and being aggrieved by the rejection of its offers of proof and by the refusal of its requests for rulings prays that this its bill of exceptions may be allowed.

INTERSTATE CONSOLIDATED
STREET RAILWAY CO.,
By EVERETT W. BURDETT,
Its Attorney.

Exceptions allowed.
LLOYD E. WHITE, *J. S. C.*

8 *Offers of Proof.*

The defendant offers to prove,—

1. That its operating expenses for the fiscal year, ending September 30th, 1903, were $117,790.89; that the taxes paid by it for the same year amounted to $7,246.22; that the number of revenue passengers carried by it during said year was 3,052,214; that its actual cost of transportation per passenger for said year was three and eighty-six one-hundredth cents, exclusive of taxes, and that, including such taxes, its total cost of transportation per passenger was four and ten one-hundredth cents; and that the cost to said company of the transportation of the passengers carried by it has not decreased since the close of its fiscal year on September 30, 1903.

2. That the defendant corporation during the fiscal year ending September 30, 1903, and ever since, has been operated economically and without any waste, extravagance or unnecessary expenditure, and that the cost of the transportation of its passengers above given was a reasonable cost.

3. That the defendant corporation obtains its entire income from the transportation of passengers, and transports passengers upon all parts of its lines within the limits of each of the towns in which it operates for the uniform fare of five cents, which is the regular fare charged by it for the transportation of passengers upon said lines.

4. That its entire railway is situated in the towns of Attleboro, North Attleboro, Wrentham and Seekonk, within this Commonwealth; that in each of these towns there are maintained sundry public schools; that a considerable percentage of the passengers carried upon the street railway cars of the defendant corporation consists of pupils of the public schools of the said towns, who use the cars of the defendant corporation for the purpose of traveling to and from the school-houses in which they attend school and their homes.

5. That one street railway company which is by law exempted from the operation of Revised Laws, chapter 112, section 72, transports nearly one-half of all the passengers transported on street railways in this Commonwealth, and receives nearly one-half of all the revenues and income received for the transportation of passengers on the street railways of this Commonwealth.

The foregoing offers of proof are made for the purpose of showing that the defendant corporation cannot comply with the Revised Laws, chaper 112, section 72, without carrying passengers for less than a reasonable compensation and for less than the actual
9 cost of transportation; and for the purpose of showing that by Revised Laws, chapter 112, section 72, it is denied the equal protection of the laws.

INTERSTATE CONSOLIDATED
STREET RAILWAY CO.,
By BURDETT, WARDWELL & SNOW,
Its Attorneys.

Defendant's Requests for Rulings.

1. The defendant requests the Court to rule that Revised Laws, chapter 112, section 72, denies to the defendant the equal protection of the laws and is therefore repugnant to the fourteenth amendment to the Constitution of the United States and void, in that it does not apply to all street railway companies, and does not apply to all persons using street railways and not even to all members of a certain class of persons using street railways, to wit, pupils, but only to certain members of such class, to wit, pupils of the public schools.

2. The defendant requests the Court to rule that Revised Laws, chapter 112, section 72, deprives the defendant of its property without just compensation and without due process of law, and is therefore void as repugnant to the tenth Article of the Declaration of Rights of Massachusetts and to the fifth and fourteenth Articles of Amendment to the constitution of the United States.

3. The defendant requests the Court to instruct the jury to return a verdict of not guilty.

INTERSTATE CONSOLIDATED STREET RAILWAY CO.,
By BURDETT, WARDWELL & SNOW,
Its Attorneys.

Complaint.

Commonwealth of Massachusetts to Frederick B. Byram, Special Justice of the First District Court of Bristol, in the County of Bristol:

Charles E. Bliss of Attleboro in said County, in behalf of said Commonwealth, on oath complains that the Interstate Consolidated Street Railway Company, a corporation established by the laws of said Commonwealth and carrying on business at Attleboro aforesaid in the County aforesaid, on the eleventh day of December in the year of our Lord nineteen hundred three, did refuse to sell tickets for the transportation of pupils of the public schools at the special rates provided by section 72 of chapter 112, of the Revised Laws of Massachusetts, contrary to the provisions of said section.

CHARLES E. BLISS.

BRISTOL, *ss:*

Received and sworn to this twelfth day of December in the year of our Lord, one thousand nine hundred and three.

Before me,

FRED B. BYRAM,
Special Justice.

A true copy of the complaint.
Attest:

GEORGE F. WILLIAMS, *Clerk.*

Copy.
Attest:

SIMEON BORDEN, *Clerk.*

11 [Endorsed:] No. — Bristol. Commonwealth *vs.* Interstate Consolidated Street Railway Company. Supreme Judicial Court. 1904. District Attorney for Commonwealth. Burdett, Wardwell & Snow for Defendant.

12 *Copy of Record of District Court.*

COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

First District Court of Bristol, in the County of Bristol, holden by the special Justice of said Court at Attleboro, in said County, on the sixteenth day of December in the year of our Lord one thousand nine hundred and three.

Be it remembered, That on the day and year aforesaid The Interstate Consolidated Street Railway Company, a corporation established under the laws of Massachusetts, and carrying on business in Attleboro in the County of Bristol brought before said Court by virtue of a warrant duly issued upon complaint of Charles E. Bliss of Attleboro in said County, who therein complains and upon oath says that said defendant at Attleboro aforesaid, in the County aforesaid, on the eleventh day of December A. D. 1903 refused to sell tickets for transportation of public school pupils at special rates provided by law as is more fully alleged in said complaint, which complaint is made a part hereof.

To which complaint the said Defendant upon being inquired of by the Court, pleads and says that it is not guilty.

Whereupon, after a full hearing and examination in said case, it appears to said Court that said Defendant is guilty.

It is therefore considered and ordered by the said Court that the said Defendant for the said offence pay a fine of twenty-five dollars.

13 From which judgment and sentence said defendant appeals; wherefore said Defendant is ordered to appear before the Superior Court next to be holden at Taunton within and for said County on the first monday of January next.

GEORGE F. WILLIAMS, *Clerk.*

A true copy.
Attest:
GEORGE F. WILLIAMS, *Clerk.*

14 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

Superior Court.

No. 2394.

COMMONWEALTH
vs.
INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY.

Defendant's Motion for Stay of Execution of Sentence.

Now comes the defendant, after conviction and sentence, and moves the Court for a stay of execution of the sentence imposed upon it, pending the determination by the Supreme Judicial Court of the questions raised in the defendant's exceptions alleged in this case, upon the ground that there is reasonable doubt whether the judgment should stand.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY,
By EVERETT W. BURDETT, *Its Attorney.*

Feb. 12, 1904.

I, Lloyd E. White, the Justice imposing sentence in this case do hereby certify that in my opinion there is reasonable doubt whether the judgment should stand. It is therefore ordered that execution of said sentence be stayed until the further order of the Court.

LLOYD E. WHITE, *J. S. C.*

Filed & all'd as per stay within Feb. 12, 1904.

15 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, March 6th, 1905.

In the Case of

COMMONWEALTH
vs.
INTERSTATE CONSOLIDATED STREET RAILWAY CO.

pending in the Superior Court for the County of Bristol

Ordered, That the Clerk of said Court in said County, make the following entry under said case, in the Docket of said Court, viz:

Exceptions overruled.

By the Court,

C. H. COOPER, *Clerk.*

March 1st, 1905.

16 *Brief Statement of the Grounds and Reasons of the Decision.*

The R. S. c 112 § 72 is constitutional.
A true copy.
Attest:
SIMEON BORDEN, *Clerk.*

17 [Endorsed:] No. 184. Supreme Judicial Court. For the Commonwealth. Rescript.—Bristol County. Com'th *vs.* Interstate Con. Street Railway Co. Rec'd in Clerk's Office, March 2", 1905. Simeon Borden, Clerk.

18 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

I, Simeon Borden, Clerk of the Superior Court, within and for the County of Bristol, hereby certify that the foregoing is a true copy of the record of conviction and sentence of The Interstate Consolidated Street Railway Company from the records of said Court; and also of all papers on file in said case.

In witness whereof I have hereunto subscribed my name and affixed the seal of said Court, at Taunton, this sixth day of September A. D. 1905.

[Seal the Supreme Court.]

SIMEON BORDEN, *Clerk.*

19 [Endorsed:] Commonwealth *vs.* The Interstate Consolidated Street Railway Company. Exemplified Copy of Record.

20 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

Superior Court for Criminal Business.

No. —.

COMMONWEALTH
vs.
INTERSTATE CONSOLIDATED STREET RAILWAY CO.

Petition for Writ of Error.

To the Honorable the Justices of the Superior Court of the Commonwealth of Massachusetts:

Your petitioner shows that at a trial in the Superior Court of the Commonwealth of Massachusetts, held in Taunton in and for the County of Bristol, on the 12th day of February, 1904, a verdict of guilty was rendered against your petitioner upon a complaint by the Commonwealth of Massachusetts, under Revised Laws, Chapter 112, Section 72; whereupon your petitioner took a bill of exceptions

to the Supreme Judicial Court of the said Commonwealth, and, at the January Sitting of 1905 of the said Supreme Judicial Court, said bill of exceptions and its accompanying record came on to be heard and was argued and thereafter on the first day of March, 1905, a rescript issued from said Supreme Judicial Court ordering the Clerk of the Superior Court for the County of Bristol to make the following entry under said case on the Docket of said Court, viz: "Exceptions overruled" and thereupon final judgment was rendered against your petitioner in the said Superior Court, it being the highest court of law in the said Commonwealth in which a judgment could be rendered in said complaint.

21 Your petitioner further shows that in the trial of the said complaint and in the rendition of judgment therein there was involved the Federal question of whether Revised Laws, Chapter 112, Section 72, deprives your petitioner of its property without just compensation and without due process of law and denies your petitioner the equal protection of the laws, and is hence repugnant to, and in conflict with, the Fifth and Fourteenth Amendments to the Constitution of the United States; and your petitioner complains that in the record and proceedings and also in the rendition of judgment in said complaint manifest error hath intervened, as more fully appears from the assignment of errors made a part hereof.

Wherefore, your petitioner prays that a writ of error may be allowed from the Supreme Court of the United States to the said Superior Court, and that a citation may issue to the Commonwealth of Massachusetts upon said writ of error, and for such other process as may cause the record in said complaint to be removed into the Supreme Court of the United States and there reviewed and examined in order that the error herein complained of may be corrected and said judgment reversed.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY.

(Signed) By MOODY, BURDETT, WARDWELL & SNOW, *Its Attorneys.*

Writ of Error allowed upon the execution of a bond by the Interstate Consolidated Street Railway Company in the sum of two hundred dollars, said bond, when approved, to act as a supersedeas.

(Signed) JOHN A. AIKEN,
Chief Justice of the Superior Court.

Dated August 17, 1905.

22 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

Superior Court.

No. —.

COMMONWEALTH OF MASSACHUSETTS
vs.
INTERSTATE CONSOLIDATED STREET RAILWAY CO.

Assignment of Errors.

Now comes the defendant, the Interstate Consolidated Street Railway Company, and says that in the record, proceedings and final judgment rendered by the Superior Court of Massachusetts, sitting in and for the County of Bristol, in the above-entitled suit, there is manifest error, to wit:

(1) The said Superior Court has erred in rejecting evidence offered by the defendant for the purpose of showing that the defendant corporation cannot comply with Revised Laws, Chapter 112, Section 72, without carrying passengers for less than a reasonable compensation and for less than the actual cost of transportation and for the purpose of showing that by Revised Laws, Chapter 112, Section 72, it is denied the equal protection of the laws, said evidence being as follows:—

That its operating expenses for the fiscal year, ending September 30th, 1903, were $117,790.89; that the taxes paid by it for the same year amounted to $7,246.22; that the number of revenue passengers carried by it during said year was 3,052,214; that its actual cost for transportation of passengers for said year was 3.86 cents, exclusive of taxes, and that including such taxes its total cost of transportation for passengers was 4.10 cents, and that the cost to the
23 said defendant for the transportation of the passengers carried by it has not decreased since the close of its fiscal year on September 30th, 1903.

The Court rejected the said evidence, and the defendant duly excepted.

(2) The said Superior Court has erred in rejecting evidence offered by the defendant for the purpose of showing that the defendant corporation cannot comply with Revised Laws, Chapter 112, Section 72, without carrying passengers for less than a reasonable compensation and for less than the actual cost of transportation and for the purpose of showing that by Revised Laws, Chapter 112, Section 72, it is denied the equal protection of the laws, said evidence being as follows:—

That during the fiscal year ending September 30th, 1903, and ever since, it has been operated economically and without any waste, extravagance or unnecessary expenditure, and that the cost of the transportation of its passengers above given was a reasonable cost.

The Court rejected the said evidence, and the defendant duly excepted.

(3) The said Superior Court has erred in rejecting evidence offered by the defendant for the purpose of showing that the defendant corporation cannot comply with Revised Laws, Chapter 112, Section 72, without carrying passengers for less than a reasonable compensation and for less than the actual cost of transportation and for the purpose of showing that by Revised Laws, Chapter 112, Section 72, it is denied the equal protection of the laws, said evidence being as follows:—

That it obtains its entire income from the transportation of passengers and transports passengers upon all parts of its line within the limits of each of the towns in which it operates for the uniform fare of five cents which is the regular fare charged by it for the transportation of passengers upon said lines.

The Court rejected the said evidence, and the defendant duly excepted.

(4) The said Superior Court has erred in rejecting evidence offered by the defendant for the purpose of showing that the defendant corporation cannot comply with Revised Laws, Chapter 112, Section 72, without carrying passengers for less than a reasonable compensation and for less than the actual cost of transportation and for the purpose of showing that by Revised Laws, Chapter 112, Section 72, it is denied the equal protection of the laws, said evidence being as follows:—

That its entire railway is situated in the towns of Attleboro, North Attleboro, Wrentham and Seekonk, within this Commonwealth; that in each of these towns there are maintained sundry public schools; that a considerable percentage of the passengers carried upon the street cars of the defendant company consists of pupils of the public schools of the said towns who use the cars of the defendant company for the purpose of traveling to and from the schoolhouses in which they attend school and their homes.

The Court rejected the said evidence, and the defendant duly excepted.

(5) The said Superior Court has erred in rejecting evidence offered by the defendant for the purpose of showing that the defendant corporation cannot comply with Revised Laws, Chapter 112, Section 72, without carrying passengers for less than a reasonable compensation and for less than the actual cost of transportation and for the purpose of showing that by Revised Laws, Chapter 112, Section 72, it is denied the equal protection of the laws, said evidence being as follows:—

That one street railway company which is by law exempted from the operation of Revised Laws, Chapter 112, Section 72, transports nearly one-half of all the passengers transported on street railways in this Commonwealth and receives nearly one-half of all the revenues and income received from the transportation of passengers on the street railways of this Commonwealth.

The Court rejected the said evidence, and the defendant duly excepted.

(6) The said Superior Court has erred in refusing to rule either in form or substance as follows, as requested by the defendant:

"Revised Laws, Chapter 112, Section 72, denies to the defendant the equal protection of the laws, and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States and void in that it does not apply to all street railway companies, and does not apply to all persons using street railways and not even to all members of a certain class of persons using street railways, to wit, pupils, but only to certain members of such class, to wit, pupils of the public schools."

The Court refused so to rule, and the defendant duly excepted.

(7) The said Superior Court has erred in refusing to rule either in form or substance, as follows, as requested by the defendant:

26 "Revised Laws, Chapter 112, Section 72, deprives the defendant of its property without just compensation and without due process of law, and is therefore void as repugnant to the Tenth Article of the Declaration of Rights of Massachusetts and to the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States."

The Court refused so to rule, and the defendant duly excepted.

(8) The said Superior Court has erred in refusing to instruct the jury, as requested by the defendant, to return a verdict of not guilty.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY,
By MOODY, BURDETT, WARDWELL & SNOW, *Its Attorneys.*

A true copy.
Attest:

SIMEON BORDEN, *Clerk.*

27 [Endorsed:] No. — Bristol, *ss.* Superior Court. Commonwealth of Massachusetts *vs.* Interstate Consolidated St. Ry. Co. Petition for Writ of Error and Assignment of Errors. Copy. Bristol *ss.* Superior Court. Received and filed Aug. 26, 1905. Simeon Borden, Clerk. Moody, Burdett, Wardwell & Snow, Attorneys at Law, India Building, 84 State St., Boston.

28 (Copy.)

Bond to Prosecute Writ of Error.

Know all men by these presents, That we, the Interstate Consolidated Street Railway Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its principal place of business at Providence, Rhode Island, as principal, and Clarence L. Watson of Attleboro, Massachusetts, and Stephen A. Briggs of said Attleboro, as sureties are held and stand firmly bound unto the Commonwealth of Massachusetts in the full and just sum of Two Hundred Dollars ($200.) to be paid to said Commonwealth of Massachusetts, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents:

Whereas lately at a hearing before the Superior Court of the Commonwealth of Massachusetts, holden at Taunton within and for

the County of Bristol for the transaction of criminal business in a suit pending in said court between the Commonwealth of Massachusetts, by complaint, and the Interstate Consolidated Street Railway Company, judgment was rendered against the said Company, and the said Company having procured a writ of error and filed a copy thereof in the Clerk's Office of the Superior Court to reverse the judgment of the aforesaid suit and a citation directed to the said Commonwealth of Massachusetts, citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington within thirty days from the date of said writ of error.

Now therefore the consideration of the above obligation is such that if the said Interstate Consolidated Street Railway Company shall prosecute its said writ of error to effect and answer all
29 damages and costs if it fail to make its plea good, then the above obligation to be null and void, otherwise to remain in full force and virtue.

In witness whereof the said Interstate Consolidated Street Railway Company has caused these presents to be signed and sealed by Marsden J. Perry, its President, thereunto duly authorized, and Clarence L. Watson and Stephen A. Briggs hereunto set their hands and seals this 21st day of August, A. D. 1905.

[SEAL.] INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY,
By MARSDEN J. PERRY, *Its President.*

Signed and sealed in presence of:
ALBERT GERALD (?).
RICHARD F. CRAWFORD.
Witness to
CLARENCE L. WATSON. [SEAL.]
RICHARD F. CRAWFORD.
Witness to
STEPHEN A. BRIGGS. [SEAL.]

Approved:
JOHN A. AIKEN,
Chief Justice of the Superior Court.

A true copy.
Attest:
SIMEON BORDEN, *Clerk.*

[Endorsed:] Interstate Con. St. Ry. Co. to Commonwealth of Massachusetts. Bond. (Copy.) Bristol *ss.* Superior Court. Received and filed. Aug. 26, 1905. Simeon Borden, Clerk.

30 COMMONWEALTH OF MASSACHUSETTS, *Bristol, ss:*

Superior Court.

I, Simeon Borden, Clerk of the Superior Court within and for the County of Bristol, hereby certify that Hon. John A. Aiken, whose name is subscribed to the annexed summons, is the Chief Justice of the Superior Court for the Commonwealth of Massachusetts, duly appointed and qualified; that I am well acquainted with his signature and handwriting, and I do hereby certify that the signature to said summons is genuine.

In witness whereof I have hereunto subscribed my name and affixed the seal of said Court, at Taunton, this twenty-sixth day of August A. D. 1905.

[SEAL.] SIMEON BORDEN, *Clerk.*

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, within thirty days from the date hereof pursuant to a Writ of Error filed in the Clerk's Office of the Superior Court of Massachusetts, for the County of Bristol, wherein the Interstate Consolidated Street Railway Company, a corporation duly organized under the laws of Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, this twenty-first day of August, in the year of our Lord one thousand nine hundred and five.

JOHN A. AIKEN,
Chief Justice of the Superior Court of Massachusetts.

A true copy.
Attest:
SIMEON BORDEN, *Clerk.*

[Endorsed:] No. —. Bristol, *ss.* Commonwealth *vs.* Interstate Consolidated St. Ry. Copy citation. Ret. into Office of Clerk of Superior Court, Aug. 29, 1905. S. Borden, Clerk. 8/29/05 Service accepted, Jas. M. Swift, District Att'y.

Endorsed on cover: File No. 19,908. Massachusetts Superior Court. Term No. 117. Interstate Consolidated Street Railway Company, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed September 19th, 1905. File No. 19,908.

Supreme Court of the United States.

No. 13. October Term, 1907.

Interstate Consolidated Street Railway Company, *Plaintiff in Error*,

v.

Commonwealth of Massachusetts.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case arose upon a complaint brought in the First District Court of Bristol County, Massachusetts, against the Interstate Consolidated Street Railway Company, the plaintiff in error, for a refusal to sell tickets for the transportation of pupils of the public schools at the special rates provided by Section 72 of Chapter 112 of the Revised Laws of Massachusetts. The Railway Company was found guilty of the offence charged, and ordered to pay a fine. From this judgment an appeal was taken to the Superior Court of Massachusetts.

Section 72 of Chapter 112 of the Revised Laws reads as follows:

"The rates of fare charged by street or elevated railway companies for the transportation of pupils of the public schools between a given point, from or to which it is necessary for them to ride in travelling to or from the school houses in which they attend school and their homes, whether such school houses are located in the city or town in which the pupils reside or in another city or town, shall not exceed one-half the regular fare charged by such street or elevated railway company for the transportation of other passengers between said points, and tickets for the transportation of pupils as aforesaid, good during the days when said schools are in session, shall be sold by said companies in lots of ten each. A railway company which violates the provisions of this section shall forfeit twenty-five dollars for each offence."

At the trial in the Superior Court the Railway Company admitted the refusal to sell the tickets as charged, but claimed that no liability attached to it therefor, on the ground that the statute was unconstitutional and void in that it denied to it the equal protection of the laws and deprived it of its property without due process of law.

To substantiate this claim the Railway Company made certain offers of proof and requested certain rulings of law based upon the offers of proof and upon the terms of the statute, to the effect that the statute denied to the defendant the equal protection of the

laws and deprived it of its property without due process of law.

[The offers of proof and requests for rulings are specifically set forth in the Record at pp. 5, 6.]

The Court rejected the offers of proof and refused to rule as requested.

A verdict of guilty was rendered and a fine imposed. Exceptions duly taken to the rejection of the offers of proof and the denial of the requests for rulings were heard by the Supreme Judicial Court of Massachusetts and overruled. Thereupon a writ of error from this Court to the Superior Court was petitioned for and allowed. The case is now before this Court for determination of the errors therein alleged.

The only contention made by the plaintiff in error in this Court is that the statute, in terms, and by reason of the exemption of an important street railway company from its provisions, is in contravention of the first clause of the Fourteenth Amendment to the Federal Constitution.

ASSIGNMENTS OF ERROR.

The plaintiff in error relies in this Court only upon its fifth, sixth, and seventh assignments of error.

The Superior Court of Massachusetts erred in rejecting evidence offered by the defendant for the purpose of showing that the defendant corporation cannot comply with Revised Laws, Chapter 112, Section 72, without carrying passengers for less than a reasonable compensation and for less than the actual cost of trans-

portation, and for the purpose of showing that by Revised Laws, Chapter 112, Section 72, it is denied the equal protection of the laws, said evidence being as follows:

That one street railway company which is by law exempted from the operation of Revised Laws, Chapter 112, Section 72, transports nearly one-half of all the passengers transported on street railways in this Commonwealth and receives nearly one-half of all the revenues and income received from the transportation of passengers on the street railways of this Commonwealth.

The Court rejected the said evidence, and the defendant duly excepted (Fifth Assignment of Error, Record, p. 12).

The said Court erred in refusing to rule either in form or substance as follows, as requested by the defendant:

> "Revised Laws, Chapter 112, Section 72, denies to the defendant the equal protection of the laws and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States and void, in that it does not apply to all street railway companies, and does not apply to all persons using street railways, and not even to all members of a certain class of persons using street railways, to wit, pupils, but only to certain members of such class, to wit, pupils of the public schools" (Sixth Assignment of Error, Record, p. 12).

The said Court erred in refusing to rule either in form or substance as follows, as requested by the defendant:

> "Revised Laws, Chapter 112, Section 72, deprives the defendant of its property without just compensation and without due process of law, and is therefore void as repugnant to the Tenth Article of the Declaration of Rights of Massachusetts, and to the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States" (Seventh Assignment of Error, Record, p. 13).

The plaintiff in error does not rely in this Court upon that part of the seventh assignment of error which deals with the Declaration of Rights of Massachusetts and the Fifth Amendment to the Constitution.

ARGUMENT.

The statute is invalid because:

I. It deprives the plaintiff of the equal protection of the laws; and

II. It deprives the plaintiff of its property without just compensation, and therefore without due process of law.

Both objections arise under Article Fourteen of the Amendments to the Constitution.

I.

EQUAL PROTECTION OF THE LAWS.

The statute denies the equal protection of the laws, because:

1*st*. It discriminates in favor of a certain class of individuals and against a certain class of corporations, and it cannot be sustained either

A. As a rate regulation; or

B. As a police regulation.

2*d*. If otherwise valid as a police regulation, it is partial and unequal in its application, because of the exemption from its provisions of a portion of the class affected by it, and is therefore invalid.

II.

DUE PROCESS OF LAW.

The statute takes the property, to wit, the service, of the plaintiff in error without due process of law because it takes that service without just compensation, inasmuch as it requires the transportation of a certain class of passengers at less than a reasonable, to wit, the regular, rate of fare.

I. EQUAL PROTECTION.

1st. Discrimination.

A. The statute is invalid as a rate regulation.

The statute makes an arbitrary and unreasonable discrimination, at the expense of the plaintiff in error,

in favor of certain members of the community, to wit, school children, and of a portion only of such children, to wit, those attending public schools.

Arbitrary discrimination between persons or corporations is unlawful.

> *Gulf, etc., Ry.* v. *Ellis*, 165 U.S. 150.
> *Lake Shore, etc., Ry.* v. *Smith*, 173 U.S. 684.

This principle is admitted by the Supreme Judicial Court of Massachusetts in its opinion in this case, where it says that if the statute were to be regarded as "an absolute and arbitrary selection of a class, independently of good reasons for making a distinction, the provision would be unconstitutional and void."

> *Commonwealth* v. *Interstate Consolidated St. Ry. Co.*, 187 Mass. 436, 438.

The question therefore is, *Does the statute make an arbitrary discrimination between individual members of the community or merely a reasonable classification of them?*

This court has pointed out the difference between discrimination and classification, in *Gulf, etc., Ry. Co.* v. *Ellis*, 165 U.S. 150, 155–160.

The rule laid down is, that "the mere fact of classification is not sufficient . . . in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classi-

fication — and is not a mere arbitrary selection" (p. 165).

Accordingly, it was held in that case that a statute giving successful plaintiffs in certain suits against railroad companies an attorney's fee of $10, without a similar provision in favor of the companies, was invalid, in that it singled out such companies from all citizens and corporations, and imposed upon them a burden which others were not compelled to bear.

The case of *Lake Shore, etc., Ry. Co.* v. *Smith*, 173 U.S 684, raised and expressly professed to answer the general question,

> "How far does the authority of the legislature extend in a case where it has the power of regulation and also the right to amend, alter or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers?" (p. 690.)

The conclusion of the Court is that the right to fix by statute maximum rates for railroad companies "is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual."

It was accordingly held to be discrimination, and not classification, to require a railway company to issue 1000-mile tickets at less than the regular rates to those who are able to purchase them.

The Court said:

> "The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation" (pp. 692–3).
>
> "If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. . . . Does not such an act, if enforced, take the property of the company without due process of law?" (pp. 694–5.)

And it was so held.

That case is strictly analogous to the case at bar. If it is unlawful to charge one class of passengers, to wit, those who can afford to buy 1000-mile tickets, less than (to use the Court's language) "those who are not fortunate enough to be members thereof," why is it not equally unlawful to favor the parents and guardians of children who attend the public schools by requiring their transportation at lower rates than must be paid by the parents and guardians of children who, from choice or necessity, attend private or parochial schools? As a question of *rate regulation*, there is no distinction between the two cases.

In the Lake Shore case the Court stated almost the

exact case at bar as an illustration of the manifest unsoundness of the argument for such an extension of the rate regulating power as that claimed. It said:

> "If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions or for all or any of the various bodies that might desire to ride at any particular time or to any particular place" (p. 694).

This language seems to have been prophetic of the present case. If the discrimination in rates in favor of school teachers struck the Court as manifestly unlawful in 1898, it would seem that its attitude would be the same now with respect to school children. If the latter are deserving of special favors, the former are more so; and if the free transportation of school children is promotive of popular education, such transportation of their teachers would be equally or more so. In the one case those who pay the fares or furnish the money for the fares are of all degrees of financial responsibility, while in the case of teachers they are universally known to be persons of small means and insufficient incomes. Indeed, if the argument is sound in favor of such transportation of children, it might well be claimed that it was equally sound with respect to the classes mentioned by the Court. With equal force and propriety, it might be said that the free or

cheap transportation of clergymen would tend to promote the public morals; of doctors, the public health; and of lawyers, the public peace and order.

When the proposition that certain people, to wit, those able and willing to buy 1000-mile tickets, should be permitted to do so at less than the regular rates charged to other members of the community was presented to this Court in the Lake Shore case the Court said that it did not seem to be "based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad" (p. 693). How much less is the proposition involved in the case at bar based upon any such reason. If the power is upheld in this instance, it will certainly mark a decided advance in the development of the doctrine of the power of regulation.

The fact is that these discriminations are nothing more or less than financial favors, extended to one and denied to another. They enable one class or division of a class to procure something, to wit, transportation, for less money than must be paid by another class or another division of the same class. This Court has declared against the principle involved, as a denial of the equal protection of the laws. All instances, therefore, of the giving of a financial advantage to one person and the denial of it to another must fall within the constitutional prohibition, unless it is made clearly to appear that the discrimination is "based upon some reasonable ground" — that is, bears some "reasonable

and just relation to the act in respect of which the classification is proposed." This Court holds that discrimination between passengers on steam railroads, in favor of those who are able and willing to buy a certain amount of transportation at one time and against those who are not, is not based upon a reasonable ground, and is therefore invalid; by the same reasoning, a discrimination between passengers on street railways, in favor of those whose parents send them to public schools and against those whose parents send them to different and perhaps better schools, is invalid. As a rate regulation, one such discrimination must stand or fall with the other.

The classification of freight bears no analogy to such discrimination between persons. As this Court said, in *Minneapolis & St. Louis R.R. Co.* v. *Minnesota*, 186 U.S. 257, 267: Differences in freight rates depend presumably to some extent upon differences in the cost of transportation, as well as the form, size, and value of the packages and the cost of handling them. None of these reasons for differential rates apply in the case of persons. Neither their form, size, or presumable value nor the difference in the cost of handling is such as to justify a difference in the cost of transportation. The case last cited had reference solely to a special tariff for the transportation of hard coal.

The suggestion that pupils of the public schools can presumably be well carried at a lower rate than adults, may readily be offset by the suggestion that the danger

and consequent liability involved in carrying them is manifestly much greater than in the case of adults.

B. The statute is invalid as a police regulation.

In the first place, it is not a police regulation within the restricted and proper definition of that term, to wit, a law for the promotion and preservation of the *health*, *safety* or *morals* of the community. The State court sustained the law "as a police regulation in the interest of education." Has the promotion of education any real or direct relation to the statute in question? Does it bear that "reasonable and just relation to the act in respect to which the classification is proposed," which the decisions of this Court require? As announced by this Court in *Lake Shore, etc., Ry.* v. *Ohio*, 173 U.S. 285, 290,

> "The well-settled rule is, that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution."

While the promotion of education is of paramount importance, a law with that end in view is not in any direct or legal sense one to safe-guard the public health, safety or morals. While it has some tendency in each of these directions, whatever influence it exerts upon

the public health, safety or morals is remote and indirect. Education is promoted in aid of the general welfare; but, like all subjects of legislation in aid of the general welfare, it is subject to the limitations of the Constitution.

If, therefore, the statute under discussion is one enacted under the general power of the legislature to enact such reasonable and wholesome laws as may tend to promote the general welfare, in order to be valid it must not impinge upon the fundamental rights guaranteed by the Federal Constitution.

But if the statute under discussion is a police regulation within the proper scope and meaning of that term, the question remains, What is the status of the act, as determined by the Fourteenth Amendment?

Some confusion — possibly some conflict — exists in the decided cases as to whether and how far the exercise of the purely police powers of a State is subject to the limitations of the Federal Constitution. This Court has affirmed that a question of constitutional law cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State.

> "As the Constitution of the United States is the supreme law of the land, . . . a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law . . . The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public

> health, and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."
>
> *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, at 558.

Here the Court refers to the police power in its more narrow and exact sense — that is, the power to preserve and promote public morals, health, and safety — and expressly says that even such an exercise of the police power is subject to constitutional limitations. If so, how much more subject to such limitations must be those broader exercises of the power inexactly called the police power, which is really and more exactly the general power of sovereignty to promote the general welfare. It is in the latter sense only that a statute such as that under discussion — which the Massachusetts court calls " a police regulation in the interest of education " — can be termed a police regulation at all.

This Court has spoken of the constitutional limitation of the exercise of the police power, in its exact sense, in other cases in the same way as already quoted.

> *Barbier* v. *Connolly*, 113 U.S. 27, 31, 32.
> *Lake Shore, etc., Ry. Co.* v. *Smith*, 173 U.S. 684.

But certain exercises of the strict police power, that is, those involving a *destruction* but not a *taking* of

property, may well be free of one constitutional guaranty, to wit, that property shall not be taken without just compensation. The abatement of nuisances — the destruction of buildings to check the course of conflagrations — the burning of gambling paraphernalia — the spilling of intoxicating liquors — the prohibition of the use of buildings for illegal purposes — and like cases, suggest themselves as instances of the exercise of the police power free of the obligation to make just or any compensation for the property destroyed or put out of use. Such a case was

Mugler v. *Kansas*, 123 U.S. 623; preceded by

Bartemeyer v. *Iowa*, 18 Wall. 129; and

Beer Co. v. *Mass.*, 97 U.S. 25;

and other cases which intervened between the earliest and latest of those decisions.

The difference between the cases in which the police power is and is not restricted by the Constitution — if such difference exists — is that, in the first class of cases, there is a taking of property, and, in the second class of cases, there is not. The destruction of property or of its use is not subject to the limitation of the Constitution respecting compensation, if such destruction is in pursuance of police regulations for the public health, morals or safety; but otherwise if a taking of property or of its use is involved, then it can only be done subject to the constitutional guaranties of just compensation and equal protection of the laws.

The present case is one of taking. The plaintiff in error's property, to wit, the use of its property, is taken, and, as it claims (*post*, p. 23), it is taken without due process of law, *i.e.*, without just compensation; and the corporation is made the victim of a law discriminating against it and in favor of certain favored individuals, and is thus deprived of the equal protection of the laws.

This, therefore, is not the case of an exercise of the police power, in an accurate sense, at all; but of an exercise of the general power of sovereignty to enact laws for the general welfare. But, in either case, it would be subject to the limitations of the Constitution against the taking of property without due process of law, and against the deprivation of the right enjoyed by every citizen that he shall not be denied the equal protection of the laws.

2d. Partial and Unequal Application.

If otherwise valid as a police regulation, the statute is partial and unequal in its application, and is therefore invalid.

The statute has heretofore been criticised because of its discrimination in favor of certain individuals, to wit, public school children, and against certain corporations, to wit, street railways. It remains to point out that it is invalid for the further reason that it exempts the most important part of the street railway system of Massachusetts — that part in Boston and its vicinity — which transports nearly one-half of all the street

railway passengers of the State, and receives nearly one-half of all the revenues and income from such passengers.

The State court overruled this objection to the statute, but based its decision wholly on certain cases of rate regulations, viz.:

> *Atty. Gen.* v. *O. C. R.R.*, 160 Mass. 62, 89.
> *Covington & Lexington, etc., Co.* v. *Sanford*, 164 U.S. 578.
> *Tilley* v. *Savannah, Florida & Western R.R.*, 5 Fed. Rep. 641, 661.
> *Ames* v. *Union Pacific Ry.*, 64 Fed. Rep. 165, 171.

We concede that if, as we claim, this case is one of rate regulation, the non-applicability of the statute to all the street railways of the State would be immaterial, as the Legislature may make one rate applicable to one company and another to another; but if it be regarded as a police regulation, as the State court says it is, then its exemption of one-half the street railway transportation system of the State from its operation is fatal to its validity. Police regulations must be applied and enforced impartially against all who come within the classes affected by them. They cannot be arbitrarily applied to one member of a certain class and not to another. They are subject to the right of all citizens to enjoy the equal protection of the laws. Their enforcement must be just and equal. Whoever comes within the mischief aimed at, or within the

general classes sought to be reached or employed, must be subjected to its operation. Hence the courts hold that all exercises of the police power, even in its strictest sense, must be equal and impartial.

If street railways are selected by the State as proper instrumentalities to be used, without reward, for the promotion of education, then all street railways must be so used. If the Boston system can be exempted, then that of any other city or town can likewise be exempted, and the logical conclusion follows that the legislature may impose this obligation upon any one or more companies of this character, and exempt all the rest. This would clearly be discrimination, without reason or justice, and would be invalid. It would not be rate regulation at all, but an improper exercise of the police power.

As this Court said in *Gulf, etc., Ry. Co.* v. *Ellis*, 165 U.S. 150, 159, with respect to the statute in that case:

> "Unless the Legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained."

Merely because certain reasons can be suggested why the legislature might have thought it wise to exempt a large portion of the street railways of the State from the operation of the statute, it does not follow that such exemption was lawful. Numerous and weighty

reasons might be suggested why there should be no such exemption. As the promotion of education is the foundation upon which the validity of the statute is asserted, the suggestion is pertinent that education is as important and as necessary in Boston and its vicinity as elsewhere; that where large masses of ignorant foreigners are crowded into great cities, the education of their children becomes of paramount importance; and that a railway system enjoying the use of the streets of a great city, and the great volume of business resulting therefrom, could more properly and more profitably than any similar company in less important sections of the State be compelled to foster and promote popular education by a reduction of fares to school children. One railway may well be required to charge different rates of fare than another, by reason of the differences in conditions in the two cases; as a matter of rate regulation, that may be unobjectionable. But when the object sought is the public good, and, as a police matter, certain agencies — that is, agencies of a certain kind — are selected for that purpose, without their consent and without compensation, then they are entitled to insist upon equal treatment, by invoking the equal protection of the laws guaranteed by the Constitution. And this cannot be denied them simply because certain reasons can be suggested why the legislature may have been prompted by the desire to promote the public welfare.

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be

presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation, is to make the protecting clause of the Fourteenth Amendment a mere rope of sand and in no manner restraining state action."

Gulf, etc., Ry. Co. v. *Ellis, supra*, p. 154.

One of the objections made by the Court in *Gulf, etc., Ry. Co.* v. *Ellis, supra*, to the statute imposing an attorney's fee upon the railroad and not upon the other party to the suit was, that the penalty or burden was not imposed upon all corporations.

"The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored" (p. 157).

Indeed, under the doctrine announced in that case, the burden of carrying public school children at half fare, in order to be valid, should have been imposed not only upon all street railways, but upon steam railroads also.

"The penalty is imposed not upon all corporations charged with the *quasi* public duty of transportation, but only upon those charged with a particular form of that duty."

Gulf, etc., Ry. Co. v. *Ellis, supra*, p. 157.

Whatever, if any, confusion or conflict may exist in the cases with reference to the applicability of the Fourteenth Amendment to certain exercises of the police power, none exists upon the question whether such a power can be exercised upon a certain portion of a given class and not upon the rest. The Laundry Cases and the Kansas City Stock Yards Case are recent and conclusive on this point.

> *Barbier* v. *Connolly*, 113 U.S. 27.
> *Soon Hing* v. *Crowley*, 113 U.S. 703.
> *Yick Wo* v. *Hopkins*, 118 U.S. 356.
> *Cotting* v. *Kansas City Stock Yards Co.*, 183 U.S. 79.

In these cases it is made plain that any law, whether enacted under the police power or otherwise, which acts unequally upon persons in similar circumstances, or which attempts a classification based upon no reasonable distinction, and confers privileges or imposes burdens arbitrarily, whether by its terms or by its application and administration, is unconstitutional and void.

The right to the equal protection of the laws is a right which preceded the adoption of the Constitution, and does not depend for its existence upon that instrument. When it guaranteed to all citizens the equal protection of the laws it was merely declaratory of a fundamental and inalienable right of every citizen of a free republic.

> "The equality of the rights of citizens is a principle of republicanism. Every republican govern-

ment is in duty bound to protect all its citizens in the enjoyment of this principle if within its power."

United States v. *Cruikshank*, 92 U.S. 542, 555.

Free text-books undoubtedly have a strong influence in promoting popular education; but could the legislature for that reason compel text-book publishers to sell them to public schools at half price, — particularly, could certain publishers be subject to such an obligation and the rest excused?

The heating of school houses is indispensable to the progress of education in Massachusetts; and yet could the legislature for that reason compel coal companies to furnish coal at a reduced rate to public schools, particularly to make such a requirement for the coal companies in certain sections of the State and not in others? And yet there is no distinction between that case and this. Both enjoy franchises granted by the public and both must use the streets in the prosecution of their business. In both instances, the regulation of their business can be made directly or indirectly to promote the cause of popular education.

II. DUE PROCESS OF LAW.

The statute takes the property of the plaintiff in error without just compensation, and therefore without due process of law.

The statute prescribes that the rate to be charged for public school children shall be *one-half* the regular

rate. The regular rate of a common carrier must be a reasonable one. Such is the universal rule derived from the common law. This Court has referred to it as "that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable."

Interstate Commerce Commission v. *Railway Company*, 167 U.S. 479, 494.

The statute, therefore, in effect prescribes that public school children shall be carried at one-half the *reasonable* rate, and hence on its face deprives the transportation company of its service, that is to say, its property, without just compensation. It is no answer that the regular rate charged by the particular company may, for the time being, be unreasonably high — the public may at any time refuse to pay that rate and by appropriate proceedings compel the company to abandon it and charge the legal rate, that is, the reasonable rate, which, therefore, must always be presumed to be the existing rate.

Hutchinson on Carriers, 3d Ed., Sect. 521, p. 568.

Rorer on Railroads, 1372.

Tift v. *Railway Company*, 123 Fed. Rep. 789.

Respectfully submitted,

EVERETT W. BURDETT,
JOSEPH H. KNIGHT.

Certified copy of opinion of the Supreme Judicial Court of Massachusetts in the case of Commonwealth vs. *Interstate Consolidated Street Railway Company.*

COMMONWEALTH OF MASSACHUSETTS.

Boston, October 11, 1907.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Commonwealth *vs.* Interstate Consolidated St. Railway Company decided on the 1st day of March, 1905.

HENRY W. SWIFT,
Reporter of Decisions.

Knowlton, C.J. The only question in this case is whether the R.L., c. 112, s. 72 is constitutional. This statute requires street railway companies to carry pupils of the public schools, in their regular course going from their homes to the schools and returning therefrom, at rates not exceeding half the regular fare charged by the company for the transportation of other passengers between the same points. The defendant offered evidence tending to show that one-half the regular fare charged for passengers on its lines, within the limits of the towns in which it operates, is less than the average cost per passenger of their transportation. It offered to prove that its business is conducted economically. It also wished to show that one street railway company which is exempted from the operation of this statute transports nearly one-half of all the passengers carried on street railways in this Commonwealth, and receives nearly one-half of all income received for the transportation of passengers on these street railways. This evidence was excluded.

The defendant contended and asked the judge to rule that the statute is repugnant to the Fourteenth Amendment of the Constitution of the United States, in that it does not apply to all the street railway companies in the Commonwealth, and does not apply to all persons using street railways, nor even to all pupils using street railways, but only to pupils of the public schools. It also asked for a ruling that the statute deprives it of its property without just compensation and without due process of law, and is repugnant to the Tenth Article of the Declaration of Rights of Massachusetts and to the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States. Exceptions were taken to the refusal of the judge to make these rulings.

The defendant does not question the right of the Legislature reasonably to regulate its rates of fare. While this right is well established, it can be exercised only in such a way as will not deprive the company of its property without compensation or without due process of law. Action of a legislature in this particular is subject to the revisory power of the courts. Reagan *vs.* Farmers Loan & Trust Company, 154 U.S. 362, 397, 399. Smyth *vs.* Ames, 169 U.S. 466, 526. Cotting *vs.* Kansas City Stock Yards Co., 183

U.S. 79, 91. If the effect of this statute were to compel the defendant to conduct its business at a loss, we should say unhesitatingly that the law was unconstitutional. But the section places no limitation upon the rates that may be charged generally. It only fixes, in connection with the regular rate, the relative fare to be charged for carrying pupils to and from the public schools. There is nothing in it to prevent the defendant from making its regular fare for passengers within the limits of a town six or seven cents instead of five cents, charging pupils in the public schools one-half of the price so established.

The R.L., c. 112, s. 1, leaves unchanged the provisions of law in force at the time of its enactment which were applicable to the Boston Elevated Railway Company. That company is thereby exempted from these provisions as to pupils of the public schools. It is contended that this makes a discrimination which deprives the defendant of the equal protection of the laws. The constitutional principle invoked in this contention does not require that the same laws shall be enacted for all street railway companies in different parts of a State. Attorney-General *vs.* Old Colony Railroad, 160 Mass. 62, 89. Covington & Lexington Turnpike Road Co. *vs.* Sanford, 164 U.S. 578. Tilley *vs.* Savannah, Florida & Western Railroad, 5 Fed. Rep. 641, 661. Ames *vs.* Union Pacific Railway, 64 Fed. Rep. 165, 171. The situation of the lines of the Boston Elevated Railway Company, in the midst of a dense population, is so different from that of other lines in the State, and their fitness for use by children in going to and from the public schools, might be found by the Legislature to be so unlike that of street railways generally in the State as properly to call for an exemption from the law established for others. We cannot say that the Legislature had no power to make this distinction, founded on differences of conditions.

The most important and difficult question in the case is, whether there is constitutional justification for a discrimination between pupils of the public schools and other persons. If this were an absolute and arbitrary selection of a class, independently of good reasons for making a distinction, the provision would be unconstitutional and void. As was said by Mr. Justice Brewer, in Gulf, Colorado & Sante Fe Railway *vs.* Ellis, 165 U.S. 150, 159: "Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

The subject of compelling a railroad company to make an exception as to its rates, in favor of a certain class of persons, was considered elaborately in Lake Shore & Michigan Southern Railway *vs.* Smith, 173 U.S. 684, and it was held that ordinarily the Legislature has not power to compel such action. The subject is also referred to in Wisconsin, Minnesota & Pacific Railroad *vs.* Jacobson, 179 U.S. 287, 301. But if the difference is founded on a reasonable distinction in principle, such discrimination does not deny the equal protection of the laws. Opinion of the Justices, 166 Mass. 589. Pacific Express Co. *vs.* Seibert, 142 U.S. 339. American Sugar Refining Co. *vs.* Louisiana, 179 U.S. 89, 92.

In this case the selection of a class is not entirely arbitrary. The education of children throughout the Commonwealth is a subject for legislation which has occupied the thoughts of our law-makers from early times. The duty of legislatures and magistrates to be diligent in the promotion of education, among all the people, is specially declared in c. 5, s. 2, of the Constitution of the Commonwealth. Compulsory attendance of children in the schools is provided for by our laws. R.L., c. 44, s. 1. Money may be appropriated by cities and towns for conveying pupils to and from the public schools. R.L., c. 25, s. 15. It cannot be said that the Legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. R.L., c. 42, s. 35. So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is justified. As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination.

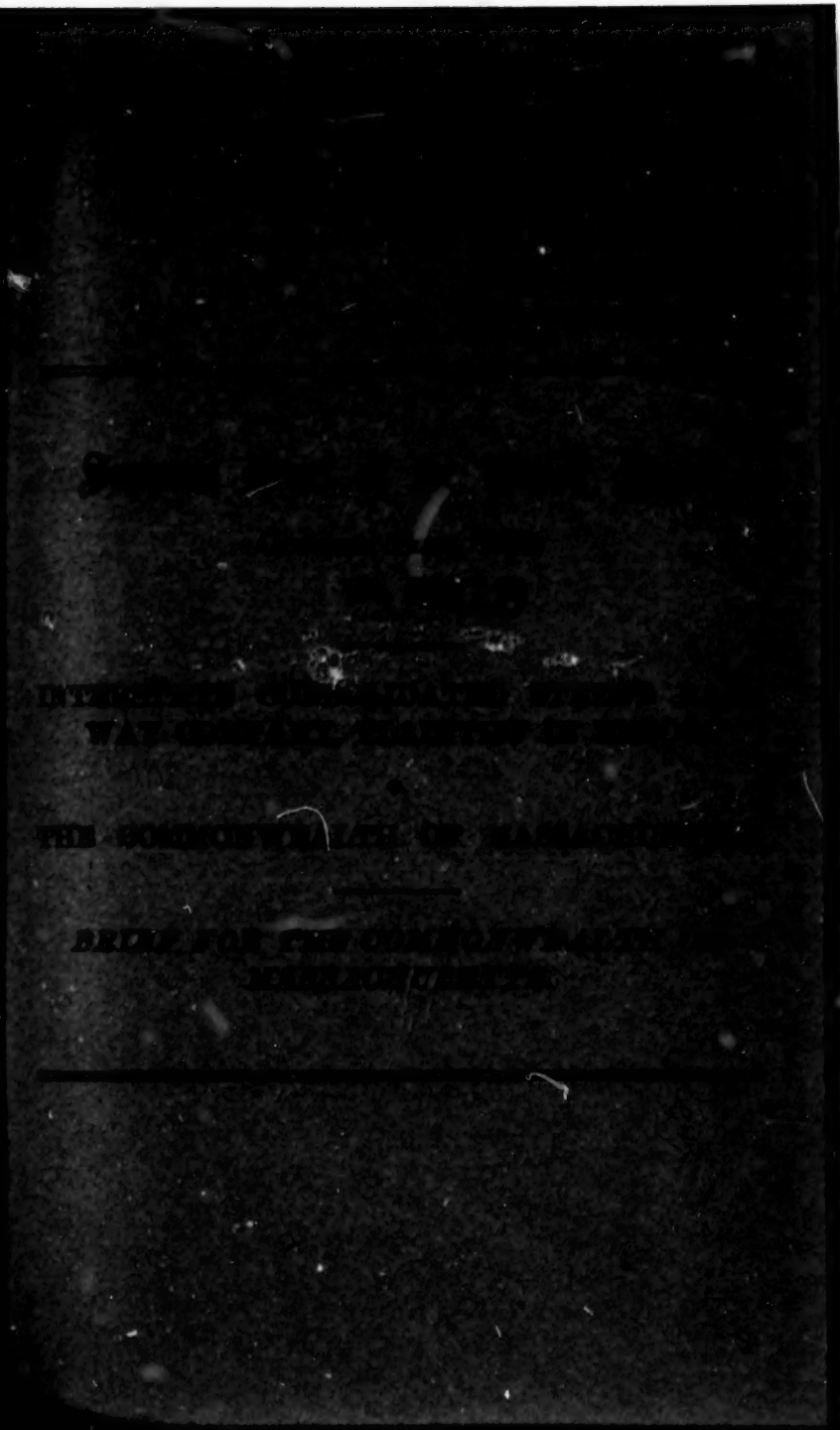
We are therefore brought to the inquiry, whether it was possible for the Legislature to conclude that this provision would entail no loss upon the street railway companies. Was it not possible for legislators to decide that pupils, in most cases, go to and from the public schools at hours when the cars are not in use by persons going to and from their work, or by many persons; that the pupils generally are of such age and size as not individually to occupy nearly so much space as other passengers; that the difference between full fare and half fare is of such importance to the parents of many of these pupils, that the number who would ride at the half rate would be nearly if not quite twice as many as at the regular rate; and that for these and other reasons railway companies would suffer no loss from carrying the children at half the regular fare? Unless we can say as matter of law that such a view would be untenable, we cannot hold that the statute is unconstitutional. Nothing less than a certainty that the provision would cause loss to the railway companies, or to some of them, would enable us to hold that the Legislature was powerless to make the requirement. The question is difficult and doubtful. It involves the consideration of facts which primarily are for the law-making power. All presumptions are in favor of the validity of legislation. The evidence offered by the defendant had no tendency to show that it would

suffer loss by carrying these pupils at half the regular rates. For all that appears, it would be in better financial condition at the end of a year, if it carried the children in compliance with the statute, than if it did not carry any of them. We hesitate to say that our law-makers could not pass the act as one which would put no financial burden upon anybody.

It has come to our notice in former cases that before this statute was passed similar conditions were sometimes imposed by towns in connection with grants of locations, and were accepted with seeming willingness by the railway corporations.

We are of opinion that the law is constitutional.

EXCEPTIONS OVERRULED.



Supreme Court of the United States.

October Term, 1906.

No. 117.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS.

Statement of the Case.

Section 72 of chapter 112 of the Revised Laws of Massachusetts provides as follows: —

> The rates of fare charged by street or elevated railway companies for the transportation of pupils of the public schools between a given point, from or to which it is necessary for them to ride in travelling to or from the school houses in which they attend school and their homes, whether such school houses are located in the city or town in which the pupils reside or in another city or town, shall not exceed one-half the regular fare charged by such street or elevated railway company for the transportation of other passengers between said points, and tickets for the transportation of pupils as aforesaid, good during the days when said schools are in session, shall be sold by said companies in lots of ten each. A railway company which violates the provisions of this section shall forfeit twenty-five dollars for each offence.

(This section was amended by St. 1906, c. 479, approved June 14, 1906, by inserting the words "or private" after the word "public." R. L., c. 112, § 72, as applied to street railway companies, appears in the revision of the railroad and street railway statutes, St. 1906, c. 463, as § 99 of Part III.)

The assignments of error raise the question whether, on the facts which the petitioner in error offered to prove, this statute, before it was amended by St. 1906, c. 479, was repugnant to the Fifth or to the Fourteenth Amendment to the Constitution of the United States, in that it denied to the petitioner in error the equal protection of the laws, or deprived it of its property without just compensation or without due process of law.

Argument.

I.

The contention that the statute is repugnant to the Fifth Amendment may be disposed of at the outset. The Fifth Amendment does not apply to action by a State.

Barron *v.* Baltimore, 7 Pet. 243.
Eilenbecker *v.* Plymouth Co., 134 U. S. 31.
McElvaine *v.* Brush, 142 U. S. 155.
Brown *v.* New Jersey, 175 U. S. 172.
Capital City Dairy Co. *v.* Ohio, 183 U. S. 238.
Lloyd *v.* Dollison, 194 U. S. 445.

II.

Since the decision of Munn *v.* Illinois and the railroad cases, decided at the same time (94 U. S. 113, *et seq.*), the law has been settled that a State has power to limit the amount of charges by railroad companies for the transportation of persons or property within its own jurisdiction.

See Ruggles *v.* Illinois, 108 U. S. 526.
Railroad Commission Cases, 116 U. S. 307, *et seq.*
Dow *v.* Beidelman, 125 U. S. 680.
Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174.
Chicago & Grand Trunk R.R. Co. *v.* Wellman, 143 U. S. 339.
St. Louis & San Francisco R.R. Co. *v.* Gill, 156 U. S. 649.
Smyth *v.* Ames, 169 U. S. 466.
Louisville & Nashville R.R. Co. *v.* Kentucky, 183 U. S. 503.
Minneapolis & St. Louis R.R. Co. *v.* Minnesota, 186 U. S. 257.

This power does not extend to the impairment of any contract contained in the charter of the railroad. (See Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174, p. 179; Stone *v.* Farmers' Loan & Trust Company, 116 U. S. 307, p. 325.) Nor does it extend to a regulation of foreign or interstate commerce. (Wabash, St. Louis & Pacific R.R. Co. *v.* Illinois, 118 U. S. 557.) There is, however, no suggestion that either of these limitations can be taken advantage of by the plaintiff in error. In fact, — as to the second limitation, — one of the errors assigned is in part the exclusion of evidence that the "entire railway is situated in the towns of Attleboro, North Attleboro, Wrentham and Seekonk, within this Commonwealth." (Fourth assignment of error, Record, p. 12.)

That the power of the State is further restricted by the provisions of the Fourteenth Amendment, so that no regulation can be made which is so unreasonable as to amount to a taking of property without due process of law or to a depriving of the equal protection of the laws, was suggested in some of the earlier cases in this court (Stone *v.* Farmers' Loan & Trust Company, 116 U. S. 307; Dow *v.* Beidelman,

125 U. S. 680, p. 690; Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174, p. 179), and was decided in the case of Chicago, Milwaukee & St. Paul R.R. Co. *v.* Minnesota, 134 U. S. 418. The principle is now clearly established.

Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362.
Covington & Lexington Turnpike Co. *v.* Sandford, 164 U. S. 578.
Smyth *v.* Ames, 169 U. S. 522.
Chicago, Milwaukee & St. Paul Ry. Co. *v.* Tompkins, 176 U. S. 167.

The difficulty, however, lies in the application of the principle.

III.

It is fundamental that a rate or schedule of rates is presumed to be reasonable, or rather not so unreasonable as to be repugnant to constitutional provisions, and that the burden of proof is upon the railroad company to show the contrary.

In approaching the consideration of a case of this kind, we start with the presumption that the act of the Legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company, or the legislation of the State must be upheld.

Mr. Justice Brewer, in Chicago, Milwaukee & St. Paul Ry. Co. *v.* Tompkins, 176 U. S. 167, at p. 173.

See also Lake Shore & Michigan Southern Railway Co. *v.* Smith, 173 U. S. 684, 695.
Minneapolis & St. Louis Railroad Co. *v.* Minnesota, 186 U. S. 257, 264.

IV.

The plaintiff in error cannot object that, by reason of the provisions of section 72 of chapter 112 of the Revised Laws, its property is taken or it is deprived of the equal protection of the laws, for it accepted its charter subject to these provisions.

Section 72 of chapter 112 of the Revised Laws was enacted as St. 1900, c. 197, which was approved April 4, 1900, and took effect upon its passage. (See Appendix A.) The provisions of section 72 of chapter 112 of the Revised Laws are in substance the same as those of St. 1900, c. 197; hence they are to be construed as continuations thereof, and not as new enactments. (R. L., c. 226, § 2; Commonwealth *v.* Anselvich, 186 Mass. 376, 379.) The burden upon the plaintiff in error was not increased by the revision of the statute.

The plaintiff in error was incorporated by St. 1901, c. 159, which was approv[illegible] March 15, 1901, and took effect upon its passage. Thi[illegible]statute authorized the purchase of the property in this Commonwealth owned by the Interstate Consolidated Street Railway Company, a Rhode Island corporation. (See Appendix B.) This statute was a public act (R. L., c. 175, § 72), and may be referred to here. (See Covington Draw Bridge Co. *v.* Shepherd, 20 How. 227, 232; Case *v.* Kelley, 133 U. S. 21, 27; Harris *v.* Quincy, 171 Mass. 472.)

The provisions of R. L., c. 112, § 72, were, therefore, in force when the plaintiff in error was incorporated, and it became subject to them. In fact, the act of incorporation expressly provided that the plaintiff in error should be subject to general laws. In St. 1901, c. 159, § 2, it is provided that: —

> And with respect to the maintenance, operation and extension of said street railways in said towns, and to the use and improvement of the property, rights and franchises so purchased, and to the

acquisition of such additional property as may be necessary or convenient for the operation of said railways, and otherwise with respect to said railways and property, the Interstate Consolidated Street Railway Company hereby incorporated shall have the powers and privileges and be subject to the duties, liabilities and restrictions set forth in the general laws of this Commonwealth now or hereafter in force relating to street railways and street railway companies, except as herein otherwise provided.

See also section 3.

That it should be subject to the restrictions in general laws (which include R. L., c. 112, § 72) was, therefore, a condition express as well as implied, upon which the State granted the plaintiff in error its franchise. The Fourteenth Amendment is not violated by the subjecting of a corporation to the general laws in force at the time of its incorporation. (See Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 247.) A State may properly impose such a restriction as that contained in R. L., c. 112, § 72, as a condition upon which it grants a franchise.

See Railroad Company *v.* Maryland, 21 Wall. 456.
Ashley *v.* Ryan, 153 U. S. 436.
Louisville & Nashville Railroad Co. *v.* Kentucky, 161 U. S. 677.
Purdy *v.* Erie Railroad Company, 162 N. Y. 42.

The fact that the plaintiff in error was authorized to take over the property of a foreign corporation does not affect the case. In Louisville & Nashville Railroad *v.* Kentucky, *supra*, the court, through Mr. Justice Brown, said (p. 702): —

The power of one railway corporation to purchase the stock and franchises of another must be conferred by express language to that effect in the charter; and hence, if the charter of the Louisville & Nashville Company had been silent upon that point, it will be conceded that it would have no power to make the proposed purchase

in this case. As the power to purchase, then, is derivable from the State, the State may accompany it with such limitations as it may choose to impose.

In Ashley *v.* Ryan, *supra*, the court, through Mr. Justice White, said (p. 442): —

> The power of corporations of other States to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that State as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws.

V.

Even if the plaintiff in error had not accepted its charter subject to the provisions of R. L., c. 112, § 72, this statute would not be unconstitutional as applied to it. R. L., c. 112, § 72, differs from rate laws generally, in that it fixes the maximum rate with reference to another rate, and not at an arbitrary amount. This in itself is clearly unobjectionable, as in the case of the "long and short haul" clause (Louisville & Nashville R.R. Co. *v.* Kentucky, 183 U. S. 503); provided the rate is not thereby fixed too low, and provided the law does not unreasonably discriminate.

VI.

From the facts before the court it does not appear that the statute (R. L., c. 112, § 72) requires the plaintiff in error to carry pupils of the public schools at a rate so low as to be unreasonable, as amounting to a taking of the property of the plaintiff in error, or to depriving it of the equal protection of the laws.

The evidence offered is insufficient, by reason of the shortness of the period covered, — *i.e.*, one year, — to warrant a conclusion that the statutory rate is too low. The plaintiff in error should at least have offered to prove that

the year was not exceptional. (See Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, — three years and three months; Covington & Lexington Turnpike Co. *v.* Sandford, 164 U. S. 578, — a number of years last past; Smyth *v.* Ames, 169 U. S. 466, — three years. But see Chicago & N. W. Ry. Co. *v.* Dey, 35 Fed. Rep. 866, — one year; Chicago, Milwaukee & St. Paul Ry. Co. *v.* Smith, 110 Fed. Rep. 473, — one year.)

Under some circumstances a rate is not so unreasonable as to be repugnant to constitutional provisions, even if so low that the company cannot pay dividends (see Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 412; Covington & Lexington Turnpike ~~R.R.~~ Co. *v.* Sandford, 164 U. S. 578, 595–7; Minneapolis & St. Louis R.R. Co. *v.* Minnesota, 186 U. S. 257, 268); or even if so low that it cannot pay operating expenses (see Minneapolis & St. Louis R.R. Co. *v.* Minnesota, 186 U. S. 257, 268). The reasonableness of a rate involves an element of reasonableness as regards the public, as well as the railroad. (Chicago, Milwaukee & St. Paul R.R. Co. *v.* Minnesota, 134 U. S. 418, 458; Covington & Lexington Turnpike ~~R.R.~~ Co. *v.* Sandford, *supra;* San Diego Land Co. *v.* National City, 174 U. S. 739, 749.) No evidence was offered in the present case tending to show that any rate greater than a half-fare rate for pupils of the public schools would be reasonable as regards the public.

However, it does not appear that the statutory rate for pupils of the public schools is so low that the plaintiff in error cannot pay both operating expenses and reasonable dividends.

The evidence offered does not show that the effect of the statute is to so reduce the gross receipts of the plaintiff in error that it cannot pay operating expenses and reasonable dividends. The plaintiff in error offered to prove that it carried in the year ending Sept. 30, 1903, 3,052,214 revenue passengers; that the uniform fare was 5 cents per passenger; that its operating expenses and taxes for the year amounted

to $125,037.11; and that a "considerable percentage" of its passengers were pupils of the public schools. (Record, p. 5.) The profit of the plaintiff in error for the year ending Sept. 30, 1903, at the regular rate of 5 cents per passenger, would, therefore, have been $27,573.59. If this profit is to be entirely wiped out by the statutory reduction, the "considerable percentage" of passengers made up of pupils of the public schools must have amounted to at least 1,102,943 persons, or over one-third of the number of passengers carried. Clearly this is not a necessary inference, from the language. If, on the other hand, the "considerable percentage" amounted to less than this number, there remained a balance of profit to be paid out in dividends. The rate of fare for pupils of the public schools is reduced 50 per cent. In the absence of any evidence as to the number of pupils carried, other than that they constituted a "considerable percentage" of the passengers, the average reduction of rates and the consequent reduction of gross receipts cannot be determined.

This method of determining the effect of the reduction of rates, *i.e.*, finding the percentage of reduction, applying this percentage to the gross receipts (from local apart from interstate business, Smyth *v.* Ames, 169 U. S. 466, 540), and comparing the result with the expenses of doing business, seems to have the sanction of this court.

> Smyth *v.* Ames, 169 U. S. 466, 528.
> Covington & Lexington Turnpike Co. *v.* Sandford, 164 U. S. 578, 595.

That the application of a given rate to the entire business of the company would reduce its earnings so that it could not pay operating expenses and reasonable dividends, is not decisive of the unreasonableness of the particular rate. In Minneapolis & St. Louis R.R. Co. *v.* Minnesota, 186 U. S. 257, the court, through Mr. Justice Brown, said (p. 267): —

We do not think it beyond the power of the State commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business. . . . Obviously such a reduction could not be shown to be unreasonable simply by providing that, if applied to all classes of freight, it would result in an unreasonably low rate.

This is as true of classes of passengers as of classes of freight.

See, also, St. Louis & San Francisco R.R. Co. *v.* Gill, 156 U. S. 649, 665.

If, however, the test of reasonableness is the effect of the prescribed rate on earnings from a limited part of the business of the company, the plaintiff in error has offered no evidence tending to show that the statutory rate for pupils is unreasonable, since it has offered no evidence as to the cost of transporting them. It is not to be assumed that the average cost of transporting passengers is the average cost of transporting pupils of the public schools. It is conceivable that the latter is much less than the former, by reason of the distance carried, the time of day, size of the passengers and consequent increased number per car, etc.

Even if it were possible to determine the amount of excess of earnings over operating expenses from the evidence offered, it would not be possible to determine whether or not the plaintiff in error could have paid reasonable dividends, since no evidence was offered as to the fair or reasonable value of its property. (Smyth *v.* Ames, 169 U. S. 466, 546; San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 747.)

Furthermore, the effect of the statute in question is not necessarily to diminish the income of the plaintiff in error. In Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339, the court, through Mr. Justice Brewer, said (p. 343): —

Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible — indeed, does not all experience suggest the probability — that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume that it has no such effect; and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law in its application to a particular company depends upon a question of fact as to its effect upon the earnings, may not the court properly leave that question to the jury and decline to assume that the effect is as claimed? There can be but one answer to these questions.

As the present case arises, it cannot be objected that the effect of the reduction of the rate for pupils of the public schools on the volume of business is a mere speculation as to the future, which cannot be the ground for judicial action (as suggested in Chicago & Northwestern R.R. Co. *v.* Dey, 35 Fed. Rep. 866, 881). The plaintiff in error offered evidence as to the volume of business in the year ending Sept. 30, 1903, during which year the statute was in effect. It does not appear that the plaintiff in error did not, except in the instance at bar, comply with the statute during that year. The evidence offered was that the uniform rate was 5 cents per passenger. (Record, p. 5.) The plaintiff in error might also have offered evidence to show the volume of business of its predecessor for a year prior to the passage of St. 1900, c. 197. This and the volume of business for the year ending Sept. 30, 1903, were existing facts, and not mere speculations, and a comparison would have been instructive as to the effect of the statute.

Finally, even if at a regular rate of 5 cents per passenger, and a half rate for pupils of public schools of 2½ cents, the company could not pay operating expenses and reasonable dividends, the statute is not necessarily objectionable as fixing too low a rate.

The section places no limitation upon the rates that may be charged generally. It only fixes, in connection with the regular rate, the relative fare to be charged for carrying pupils to and from the public schools. There is nothing in it to prevent the defendant from making its regular fare for passengers within the limits of a town 6 or 7 cents, instead of 5 cents, charging pupils in the public schools one-half of the price so established.

Knowlton, C.J., in Commonwealth *v.* Interstate St. Ry. Co., 187 Mass. 436, 437.

There is no other statute which fixes the rate of the regular fare, nor was any evidence offered tending to show that a fare greater than 5 cents per passenger would be unreasonable, or in violation of any contract contained in the charter. The regular rate of 5 cents per passenger was necessarily fixed by the plaintiff in error after the statute in question took effect. It had, therefore, at least constructive knowledge that by fixing the regular rate it also fixed the rate for public school pupils. Under these circumstances, the plaintiff in error cannot fix its regular rate as it pleases, and then object that the resulting rate for pupils of the public schools is too low.

VII.

From the facts before the court it does not appear that the statute (R. L., c. 112, § 72) requires the plaintiff in error to carry pupils of the public schools at a rate which so discriminates between pupils of the public schools and others as to be unreasonable, as amounting to a taking of the property of the plaintiff in error, or to depriving it of the equal protection of the laws.

State-made rates are regularly based on classifications of traffic, and are not thereby invalidated. (Minneapolis & St. Louis R.R. Co. *v.* Minnesota, 186 U. S. 257.) Undoubtedly these classifications must, as in other matters, be founded on reasonable distinctions in principle.

See Pacific Express Co. *v.* Seibert, 142 U. S. 339.
Gulf, Colorado & Santa Fé Ry. Co. *v.* Ellis, 165 U. S. 150.
American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89.

The plaintiff in error has offered no evidence to show either that a division of passengers into two classes, first, pupils of the public schools, and second, all others, is not a reasonable classification, or that the difference in rate between the two classes is unreasonable.

In the absence of such evidence it cannot be said that the Legislature acted unreasonably in making the classification. The phrase "public schools" has a recognized meaning in the Commonwealth of Massachusetts. (Constitution, Articles of Amendment, XVIII; Merrick *v.* Amherst, 12 Allen, 500, 508; Jenkins *v.* Andover, 103 Mass. 94, 99.) The meaning of the phrase "pupils of the public schools" is equally clear. Every city or town is required to maintain schools for thirty-two or twenty-eight weeks in each year, "for the instruction of all the children who may legally attend a public school therein." (R. L., c. 42, § 1.) The school committee of each city and town is required to take a census of all children between five and fifteen years of age, and of all minors over fourteen years of age who cannot read and write English. (R. L., c. 43, § 3.) Attendance at public schools is required of children between seven and fourteen years of age, with certain exceptions. (R. L., c. 44, § 1.) It is to be inferred that pupils of the public schools are smaller than the average passenger, so that more of them can be carried in a car. They travel regularly, at stated hours, and in approximately the same numbers each day, so that the railway can readily make provision to carry them. It may be that they travel at times when other traffic is light. It is not improbable that from the usually central location of schoolhouses the distance travelled by each is less than that

travelled by the average passenger. The classification of pupils of public schools and other persons, therefore, though not absolutely accurate, is a practicable and reasonable classification on the basis of service rendered.

Furthermore, the education of youth is a purpose public in its nature, and one for which money may be raised by taxation, and the transportation of pupils is incidental thereto. Cities and towns are authorized by statute to appropriate money for conveying pupils to and from the public schools. (R. L., c. 25, § 15.) Though a State may not require a railway to carry public school pupils at a loss, or require other passengers to share the expense of carrying them, it may, short of this, require, as a police regulation in the interests of education, a railroad to carry pupils at a reduced rate.

The case is to be distinguished from Lake Shore & Michigan Southern Ry. *v.* Smith, 173 U. S. 684, which held a law requiring the sale of one-thousand-mile tickets to be unconstitutional. In that case the classification was of persons who bought tickets for a given number of miles, and persons who did not. The court said that the legislation was arbitrary, and not for the safety, health or proper convenience of the public. (See Wisconsin, Minnesota & Pacific R.R. *v.* Jacobson, 179 U. S. 287, 301.) In the present case the classification is not arbitrary, but is based on a reasonable distinction in principle. Moreover, the effect of the statute is to promote the proper convenience of the public.

VIII.

From the facts before the court it does not appear that the statute (R. L., c. 112, § 72) so discriminates between the Boston Elevated Railway Company and the plaintiff in error as to deprive the latter of the equal protection of the laws.

The constitutional principle invoked in this contention does not require that the same laws shall be enacted for all

street railway companies in different parts of a State. It requires merely that the law apply equally to all railways similarly situated.

If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.

Dow *v.* Beidelman, 125 U. S. 680, at page 691. See Budd *v.* New York, 143 U. S. 517, in which case it was held that a law regulating elevators in places of 130,000 population or more did not deprive persons owning elevators in such places of the equal protection of the laws.

In Covington and Lexington Turnpike Road Company *v.* Sandford, 164 U. S. 578, a statute fixing rates to be charged by a turnpike company was under consideration. The court, through Mr. Justice Harlan, said (p. 598): —

The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the Legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public. If the rates prescribed for the defendant in this case were manifestly much lower — taking them as a whole — than the Legislature has, by general law, prescribed for other corporations whose circumstances and location are not unlike those of the defendant, a different question would be presented.

See, also, Chicago, Burlington & Quincy R.R. Co. *v.* Iowa, 94 U. S. 155, 163.
New York, New Haven & Hartford R.R. Co. *v.* New York, 165 U. S. 628, 633.

Savannah Etc., Railway Co. *v.* Savannah, 198 U. S. 392, 397.

Metropolitan Street Railway Co. *v.* New York, 199 U. S. 1, 47.

Ames *v.* Union Pacific Railway, 64 Fed. Rep. 165.

It does not appear that the exemption of the Boston Elevated Railway Company is not reasonable, as founded on differences in conditions. In the present case, when before the Supreme Judicial Court of Massachusetts, 187 Mass. 436, the court said (at p. 438): —

> The situation of the lines of the Boston Elevated Railway Company, in the midst of a dense population, is so different from that of other lines in the State, and their fitness for use by children in going to and from the public schools, might be found by the Legislature to be so unlike that of street railways generally in the State, as properly to call for an exemption from the law established for others. We cannot say that the Legislature had no power to make this distinction, founded on differences in conditions.

The statute before the court, unlike that considered in the case of Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, does not base its classification solely on volume of business.

Respectfully submitted,

DANA MALONE,
Attorney-General of Massachusetts

FRED T. FIELD,
Assistant Attorney-General of Massachusetts.

APPENDIX.

A.

Acts 1900, c. 197.

An Act relative to the transportation of scholars of the public schools by street railway companies.

Be it enacted, etc., as follows:

Section 1. The rates of fare charged by street or elevated railway companies in this Commonwealth for the transportation of scholars of the public schools between any given point from or to which it is necessary for them to ride in travelling to and from the schoolhouses in which they attend school, and their homes, whether such schoolhouses are located in the city or town in which the scholars reside or in any other city or town, shall not exceed one half the regular fare charged by such street or elevated railway company for the transportation of other passengers between said points.

Section 2. Tickets for the transportation of scholars as aforesaid shall be sold in lots of ten each, and shall be received on said street and elevated railways during the days on which said schools are in session.

Section 3. Any railway company violating this act by refusing to transport a scholar or to furnish a package of tickets as aforesaid shall forfeit the sum of twenty-five dollars for each offence.

Section 4. This act shall take effect upon its passage, but for the term of twenty-five years from the tenth day of June in the year eighteen hundred and ninety-seven it shall not apply to the Boston Elevated Railway Company or to any railways now owned, leased or operated by it.

Approved April 4, 1900.

B.

Acts 1901, c. 159.

An Act to incorporate the interstate consolidated street railway company.

Be it enacted, etc., as follows:

Section 1. John Gordon, R. Henry Hinkley, Clarence L. Watson, Everett W. Burdett and Charles A. Snow, their associates and successors, are hereby made a corporation under the name of the Interstate Consolidated Street Railway Company, with all the powers and privileges and subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railway companies, except as herein provided. The persons above named shall constitute the first board of directors of said company, which shall have power to increase the number of directors to seven, and to accept resignations and fill vacancies in the board and in any of the offices of the company. They shall elect one of their number to be president of the board and of the company, and shall elect a clerk, who shall be sworn, and a treasurer, who shall give bond with sufficient sureties in the sum required by the by-laws, for the faithful discharge of his duties. The directors of said company, or a majority of them, need not be inhabitants of the towns in which said railway is located. The first meeting of the stockholders of said company for the adoption of by-laws and the further organization of the corporation shall be called in the manner provided in the first clause of section forty-five of chapter one hundred and twelve of the Public Statutes.

Section 2. Said company is hereby authorized, subject to the approval of the board of railroad commissioners, to acquire by purchase all the railways, equipments, franchises, rights and other property, real and personal, in this Commonwealth now owned and held by the Interstate Consolidated Street Railway Company, a corporation created under the laws of the state of Rhode Island, including all locations in the public streets heretofore granted by the selectmen of the towns of Attleborough, North Attleborough, Wrentham and Seekonk, to said Interstate Consolidated Street Railway Company of Rhode Island, or its predecessors, which locations, when so acquired, shall become and be the locations of the Interstate Consolidated Street Railway Company hereby incorpo-

rated, the same as though they had been originally granted to and accepted by it or by its directors or a majority thereof; and including also the right to act as a common carrier of baggage and small parcels of merchandise, and to carry the United States mail, in the manner and subject to the limitations named in chapter three hundred and twenty-two of the acts of the year nineteen hundred conferring said right upon said Interstate Consolidated Street Railway Company of Rhode Island. And with respect to the maintenance, operation and extension of said street railways in said towns, and to the use and improvement of the property, rights and franchises so purchased, and to the acquisition of such additional property as may be necessary or convenient for the operation of said railways, and otherwise with respect to said railways and property, the Interstate Consolidated Street Railway Company hereby incorporated shall have the powers and privileges and be subject to the duties, liabilities and restrictions set forth in the general laws of this Commonwealth now or hereafter in force relating to street railways and street railway companies, except as herein otherwise provided.

SECTION 3. Upon the purchase and transfer of the railways, equipments, franchises, rights, locations and other property above mentioned, chapter four hundred and forty-eight of the acts of the year eighteen hundred and ninety-five shall become void and of no effect, except as to any acts theretofore done or liabilities theretofore incurred thereunder. The property and franchises aforesaid shall remain liable, notwithstanding the transfer thereof herein authorized, for the debts and obligations of said Interstate Consolidated Street Railway Company of Rhode Island incurred or existing in this Commonwealth, until the same are fully paid or discharged.

SECTION 4. The Interstate Consolidated Street Railway Company hereby incorporated may from time to time, upon application to and by permission of the board of railroad commissioners, issue its capital stock and bonds, or the proceeds thereof, to such amounts as may be authorized by said board, in payment for the properties to be acquired by it as aforesaid, and for any of the other purposes for which street railway companies are or may be authorized by the general laws to issue capital stock and bonds.

SECTION 5. Said company may use electricity as a motive power, and for that purpose may erect and maintain poles, wires

and other apparatus and devices for conducting electricity in, over and under any streets, highways, bridges and town ways in any of the towns hereinbefore named wherein its predecessors have been or it may hereafter be authorized by the selectmen of said towns, respectively, to operate its railway; and may sell to or purchase from any other company electricity necessary for or incident to the operation of street railways.

SECTION 6. This act shall take effect upon its passage.

Approved March 15, 1901.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 13. Argued October 15, 16, 1907.—Decided November 4, 1907.

Requirements contained in another statute or document may be incorporated in a charter by generic or specific reference and, if clearly identified, the charter has the same effect as if it itself contained the restrictive words, and the question of the constitutionality of the statute referred to is immaterial.

A street railway corporation taking a legislative charter subject to all duties and restrictions set forth in all general laws relating to corporations of that class cannot complain of the unconstitutionality of a prior enacted statute compelling them to transport children attending public schools at half price.

187 Massachusetts, 436, affirmed.

THE facts, which involve the constitutionality of the statute of Massachusetts requiring the transportation of school children by certain railways at half fare, are stated in the opinion.

Mr. Everett Watson Burdett, with whom *Mr. Joseph H. Knight* was on the brief, for plaintiff in error:

The statute is invalid as a rate regulation. It makes an arbitrary and unreasonable discrimination, at the expense of the plaintiff in error, in favor of certain members of the community, to wit, school children, and of a portion only of such children, to wit, those attending public schools. That this is unlawful is

admitted by the Supreme Judicial Court of Massachusetts in its opinion in this case, where it says that if the statute were to be regarded as an absolute and arbitrary selection of a class, independently of good reasons for making a distinction, the provision would be unconstitutional and void. *Commonwealth* v. *Interstate Street Ry. Co.*, 187 Massachusetts, 436, 438; *Gulf &c. Ry.* v. *Ellis*, 165 U. S. 150. And see *Lake Shore &c. Ry.* v. *Smith*, 173 U. S. 684, holding it unlawful to charge one class of passengers, to wit, those who can afford to buy 1000-mile tickets, less than those who are not fortunate enough to be members thereof. As a question of rate regulation, there is no distinction between that case and this.

Plaintiff in error is not estopped to set up the unconstitutionality of the statute. *O'Brien* v. *Wheelock*, 184 U. S. 450, 489.

The statute is invalid as a police regulation.

The promotion of education has no real or direct relation to the statute in question. It does not bear any reasonable or just relation to the act in respect to which the classification is proposed. *Lake Shore &c. Ry.* v. *Ohio*, 173 U. S. 285, 290.

While education may be promoted in aid of the general welfare, like all subjects of legislation in aid of the general welfare, it is subject to the limitations of the Constitution, and a statute in order to be valid must not impinge upon the fundamental rights guaranteed thereby. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, at 558; *Barbier* v. *Connolly*, 113 U. S. 27, 31, 32; *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684.

While the destruction of property or of its use is not subject to the limitation of the constitution respecting compensation, if such destruction is in pursuance of police regulations for the public health, morals or safety; if a taking of property or of its use is involved, then it can only be done subject to the constitutional guaranties of just compensation and equal protection of the laws. In the present case plaintiff's property, or the use of its property, is taken without due process of law, *i. e.*, without just compensation; and the corporation is dis-

criminated against in favor of certain favored individuals, and is thus deprived of the equal protection of the laws.

It, therefore, is not the exercise of the police power, but of the general power of sovereignty to enact laws for the general welfare. But, in either case, it would be subject to the limitations of the constitution against the taking of property without due process of law, and against the deprivation of the right enjoyed by every citizen that he shall not be denied the equal protection of the laws.

If otherwise valid as a police regulation, the statute is partial and unequal in its application, and is therefore invalid.

If street railways are selected by the State as proper instrumentalities to be used, without reward, for the promotion of education, then all street railways must be so used. If one system can be exempted, then any other can likewise be exempted, and the logical conclusion follows that the legislature may impose this obligation upon any one or more companies of this character, and exempt all the rest. This would clearly be discrimination, without reason or justice, and would be invalid. It would not be rate regulation at all, but an improper exercise of the police power. *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150, 159. See also *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79.

The statute takes the property of the plaintiff in error without just compensation, and therefore without due process of law.

The statute prescribes that the rate to be charged for public school children shall be one-half the regular rate. The regular rate of a common carrier must be a reasonable one. *Interstate Commerce Commission* v. *Railway Company*, 167 U. S. 479, 494.

The statute, therefore, in effect prescribes that public school children shall be carried at one-half the reasonable rate, and hence on its face deprives the transportation company of its service, that is to say, its property, without just compensation.

Hutchinson on Carriers, 3d ed. § 521, p. 568; Rorer on Railroads, 1372; *Tift* v. *Railway Company*, 123 Fed. Rep. 789.

Mr. Dana Malone, with whom *Mr. Fred. T. Field* was on the brief, for defendant in error:

Since the decision of *Munn* v. *Illinois*, 94 U. S. 113, the law has been settled that a State has power to limit the amount of charges by railroad companies for the transportation of persons or property within its own jurisdiction. *Ruggles* v. *Illinois*, 108 U. S. 526; *Railroad Commission Cases*, 116 U. S. 307, *et seq.*; *Dow* v. *Beidelman*, 125 U. S. 680; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; *Chicago & Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S. 339; *St. Louis & San Francisco R. R. Co.* v. *Gill*, 156 U. S. 649; *Smyth* v. *Ames*, 169 U. S. 466; *Louisville & Nashville R. R. Co.* v. *Kentucky*, 183 U. S. 503; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257.

The plaintiff in error cannot object that, by reason of the provisions of § 72 of ch. 112, Rev. Laws, its property is taken or it is deprived of the equal protection of the laws, for it accepted its charter subject to these provisions. The law was enacted as St. 1900, c. 197, approved April 4, 1900, and took effect upon its passage and its provisions are in substance the same; hence they are to be construed as continuations thereof, and not as new enactments. R. L., c. 226, § 2; *Commonwealth* v. *Anselvich*, 186 Massachusetts, 376, 379. The burden upon the plaintiff in error was not increased by the revision of the statute.

The plaintiff in error was incorporated by St. 1901, c. 159, approved March 15, 1901, and took effect upon its passage. This statute was a public act, R. L., c. 175, § 72, and may be referred to here. See *Covington Draw Bridge Co.* v. *Shepherd*, 20 How. 227, 232; *Case* v. *Kelley*, 133 U. S. 21, 27; *Harris* v. *Quincy*, 171 Massachusetts, 472.

The statute was, therefore, in force when the plaintiff in error was incorporated, and it became subject to it. In fact,

the act of incorporation expressly provided that the plaintiff in error should be subject to general laws. St. 1901, c. 159, § 2. See also section 3. This condition was express as well as implied, and upon which the State granted the franchise. The Fourteenth Amendment is not violated by the subjecting of a corporation to the general laws in force at the time of its incorporation. *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 247. A State may properly impose such a restriction as a condition upon which it grants a franchise. *Railroad Company* v. *Maryland*, 21 Wall. 456; *Ashley* v. *Ryan*, 153 U. S. 436; *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677; *Purdy* v. *Erie Railroad Company*, 162 N. Y., 42.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a complaint against the plaintiff in error for refusing to sell tickets for the transportation of pupils to and from the public schools at one-half the regular fare charged by it, as required by Mass. Rev. Laws, c. 112, § 72. At the trial the Railway Company admitted the fact, but set up that the statute was unconstitutional, in that it denied to the company the equal protection of the laws and deprived it of its property without just compensation and without due process of law. In support of this defence it made an offer of proof which may be abridged into the propositions that the regular fare was five cents; that during the last fiscal year the actual and reasonable cost of transportation per passenger was 3.86 cents, or, including taxes, 4.10 cents; that pupils of the public schools formed a considerable part of the passengers carried by it, and that the one street railway expressly exempted by the law transported nearly one-half the passengers transported on street railways and received nearly one-half the revenue received for such transportation in the Commonwealth. The offer was stated to be made for the purpose of showing that the plaintiff in error could not comply with the statute without carrying passengers for less than a reasonable compensation

and for less than cost. The offer of proof was rejected, and a ruling that the statute was repugnant to the Fourteenth Amendment was refused. The plaintiff in error excepted and, after a verdict of guilty and sentence, took the case to the Supreme Judicial Court. 187 Massachusetts, 436. That Court overruled the exceptions, whereupon the plaintiff in error brought the case here.

This court is of opinion that the decision below was right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground. The section of the Revised Laws (c. 112, § 72), was a continuation of St. 1900, c. 197. Rev. Laws, c. 226, § 2. *Commonwealth* v. *Anselvich*, 186 Massachusetts, 376, 379, 380. The act of incorporation went into effect March 15, 1901. St. 1901, c. 159. By the latter act the plaintiff in error was "subject to all the duties, liabilities and restrictions set forth n all general laws now or hereafter in force relating to street railway companies, except," etc. § 1. See also § 2. There is no doubt that, by the law as understood in Massachusetts, at least, the provisions of Rev. L. c. 112, § 72, St. 1900, c. 197, if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already existing corporation or not. The railroad company would have come into being and have consented to come into being subject to the liability and could not be heard to complain. *Rockport Water Co.* v. *Rockport*, 161 Massachusetts, 279; *Ashley* v. *Ryan*, 153 U. S. 436, 443; *Wight* v. *Davidson*, 181 U. S. 371, 377; *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 579.

If the charter, instead of writing out the requirements of Rev. L. 112, § 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, as the force given to it

by reference and incorporation would be derived wholly from the charter. The document, therefore, might as well be an unconstitutional as a constitutional law. See *Commonwealth* v. *Melville*, 160 Massachusetts, 307, 308. But the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear. *Corry* v. *Baltimore*, 196 U. S. 466, 477. See *Purdy* v. *Erie R. R. Co.*, 162 N. Y., 42.

Speaking for myself alone, I think that there are considerations on the other side from the foregoing argument that make it unsafe not to discuss the validity of the regulation apart from the supposition that the plaintiff in error has accepted it. See *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 468. Therefore I proceed to state my grounds for thinking the statute constitutional irrespective of any disabilities to object to its terms.

The discrimination alleged is the express exception from the act of 1900 of the Boston Elevated Railway Company and the railways then owned, leased or operated by it. But, in the first place, this was a legislative adjudication concerning a specific road, as in *Wight* v. *Davidson*, 181 U. S. 371, not a general prospective classification as in *Martin* v. *District of Columbia*, 205 U. S. 135, 138. A general law must be judged by public facts, but a specific adjudication may depend upon many things not judicially known. Therefore the law must be sustained on this point unless the facts offered in evidence clearly show that the exception cannot be upheld. But the local facts are not before us, and it follows that we cannot say that the legislature could not have been justified in thus limiting its action. *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 597, 598. In the next place, if the only ground were that the charter of the Elevated Railway contained a contract against the imposition of such a requirement, it would be attributing to the Fourteenth Amendment an excessively nice operation to say that the immunity of a single corporation prevented the passage of an otherwise desirable and wholesome law. It is unnecessary to consider what would be the

effect on the statute by construction in Massachusetts if the exception could not be upheld. For, if in order to avoid the Scylla of unjustifiable class legislation, the law were read as universal, (see *Dunbar* v. *Boston & Providence R. R. Co.*, 181 Massachusetts, 383, 386) it might be thought by this Court to fall into the Charybdis of impairing the obligation of a contract with the elevated road, although that objection might perhaps be held not to be open to the plaintiff in error here. *Hatch* v. *Reardon*, 204 U. S. 152, 160.

The objection that seems to me, as it seemed to the court below, most serious is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss. The conventional fare of five cents presumably is not more than a reasonable fare, and it is at least questionable whether street railway companies would be permitted to increase it on the ground of this burden. It is assumed by the statute in question that the ordinary fare may be charged for these children or some of them when not going to or from school. Whatever the fare, the statute fairly construed means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage, if we looked only to the business aspect of the question. Moreover, while it may be true that in some cases rates or fares may be reduced to an unprofitable point in view of the business as a whole or upon special considerations, *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 256, 267, it is not enough to justify a general law like this, that the companies concerned still may be able to make a profit from other sources, for all that appears. *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 24, 25.

Notwithstanding the foregoing considerations I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights like others

are matters of degree and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation. *Martin* v. *District of Columbia*, 205 U. S. 135, 139; *Camfield* v. *United States*, 167 U. S. 518, 524.

If the Fourteenth Amendment is not to be a greater hamper upon the established practices of the States in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed.

Education is one of the purposes for which what is called the police power may be exercised. *Barbier* v. *Connolly*, 113 U. S. 27, 31. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line. And, to return to the taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt. The present requirement is not different in fundamental principle, although the tax is paid in kind and falls only on the class capable of paying that kind of tax—a class of *quasi* public corporations specially subject to legislative control.

Thus the question narrows itself to the magnitude of the burden imposed—to whether the tax is so great as to exceed

the limits of the police power. Looking at the law without regard to its special operation I should hesitate to assume that its total effect, direct and indirect, upon the roads outside of Boston amounted to a more serious burden than a change in the law of nuisance, for example, might be. See further, *Williams* v. *Parker*, 188 U. S. 491. Turning to the specific effect, the offer of proof was cautious. It was simply that a "considerable percentage" of the passengers carried by the company consisted of pupils of the public schools. This might be true without the burden becoming serious. I am not prepared to overrule the decision of the legislature and of the highest court of Massachusetts that the requirement is reasonable under the conditions existing there, upon evidence that goes no higher than this. It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

MR. JUSTICE HARLAN is of opinion that the constitutionality of the act of 1900 is necessarily involved in the determination of this case. He thinks the act is not liable to the objection that it denies to the railway company the equal protection of the laws. Nor does he think that it can be held, upon any showing made by this record, to be unconstitutional as depriving the plaintiff in error of its property without due process of law. Upon these grounds alone, and independent of any other question discussed, he joins in a judgment of affirmance.

Judgment affirmed.

MR. JUSTICE MOODY, having been of counsel, did not sit in this case.